SUPREME COURT, U. S.

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In The

Supreme Court of the United States

October Term, 1966

No. 404

FRANK DE STASIO,
Petitioner,

- v -

STATE OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

MICHAEL A. QUERQUES
Attorney for Petitioner
501 Central Avenue
Orange, New Jersey

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Frank DeStasio, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above entitled case on May 29, 1967 which judgment affirmed a judgment of sentence of the Essex County Court entered on June 1, 1966.

Citation to Opinion Below

The opinion of the Supreme Court of New Jersey, printed in Appendix B hereof, is reported at 49 N.J. 247, 229 A.2d 636.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on Mav 1, 1967 but the filing thereof was not until May 29, 1967 on which date petitioner's motion for a stay of the mandate and for continuance of bail was denied. A copy of the mandate and the order denying the stay are printed in Appendix C hereto, infra. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) since petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States are drawn in question.

Questions Presented

1. Did the New Jersey Procedure, established by administrative directive of the New Jersey Supreme Court, whereby a single judge in each county is designated to sentence all individuals convicted of gambling offenses, whether or not tried before that judge, violate the due process and equal protection clauses of the Fourteenth Amendment?

2. Did the New Jersey Procedure whereby those convicted of gambling offenses are presumed by the sentencing judge to be a part of organized crime, without any hearing on this issue or any investigation into its truth, and are thereby given increased sentences, violate the due process and equal protection clauses of the Fourteenth Amendment?

3. Did the Prosecutor's comment in his opening to the jury wherein he invited their attention to "any testimony the defendant might give" violate petitioner's rights under the Fifth Amendment and Griffin v. California, 380 U.S. 609 (1965)?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution, which are printed in Appendix A, infra.

Statement

A single count indictment was returned by an Essex County Grand Jury charging petitioner with bookmaking. Petitioner's trial before a jury commenced on April 18, 1966 and on April 19, 1966 the jury returned a verdict of guilty. Petitioner was sentenced before a judge other than the trial judge on June 1, 1966.

At the very conclusion of his opening statement to the jury, the Assistant Prosecutor made the following statement:

> "The State, by the events which I have just narrated, will prove that these things did occur and I ask you to consider the testimony of the individuals involved. As counsel pointed out, these are police officers and you are not to give any more weight to what they say than to what anybody else who comes in and testifies to but, I ask you, what motive do they have not to tell the truth today? I ask you to consider that

> just as you would consider any testimony that the defendant might give" (2a)* (Emphasis added.)

Petitioner was tried before one judge but was sentenced before another judge, even though the trial judge was not disabled in any way from performing this duty (32a). This unusual procedure was the result of a certain "directive" issued by the New Jersey Supreme Court to all assignment judges in the state. The directive was never made public until it was set forth in the opinion below, infra. It directed that one judge in each county be designated to take over the sentencing of all persons convicted of gambling, i.e. lottery or bookmaking offenses in that county. The purpose of the directive was stated to be a desire to achieve uniformity in sentencing and to eliminate the situation where judges within a county differed widely in their treatment of gambling offenders. The sentencing judge herein admitted that he was acting pursuant to this directive (37a).

The directive's issuance was widely reported in the press where it was accompanied by expressions of opinion from the Chief Justice of the New Jersey Supreme Court concerning appropriate penalties for gambling offenders (52a-54a). This philosophy was that all gambling offenses are part of syndicated or organized crime and that, therefore, those convicted should receive jail sentences unless they co-operated with the authorities in exposing their superiors in the alleged "organization." While the sentencing judge herein

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* "a" refers to the appellant's appendix in the Supreme Court of New Jersey, which appendix has been certified and filed with this petition as a part of the official record below.

avowed that he had no fixed policy of sending all offenders to jail (37a), there can be no question that he sent nearly 90 percent to jail (Supplemental appendix of State of New Jersey, Ps2a-Ps8a). In addition, judges in other counties who were sentencing gambling offenders understood the directive as encompassing these guidelines for punishment (56a, 43a-51a). This entire philosophy of the Chief Justice was, in any event, reiterated in the opinion below.

Upon his conviction petitioner was sentenced to a term of 1-2 years in prison and a fine. It must be noted that, while petitioner received the mandatory minimum term for bookmaking, suspension of the sentence or probation was still a possibility open to, but not availed of, by the sentencing judge. Petitioner appealed to the Appellate Division of the Superior Court but his appeal was certified to the Supreme Court of New Jersey before argument in the Appellate Division. On May 1, 1967 the Supreme Court of New Jersey affirmed petitioner's conviction. The mandate on affirmance was, however, not filed until May 29, 1967 due to the pendency of a motion to stay the mandate and continue bail pending this application, which was denied on that date. Application was made to Mr. Justice Brennan for bail and that application was denied on June 16, 1967.

How Federal Questions are Presented

With respect to the prosecutor's opening remark, counsel moved for a mistrial and the Fifth Amendment question was presented on appeal to the New Jersey Supreme Court The sentencing procedure was likewise challenged, at the time of

sentence and on appeal, as having violated various federal constitutional rights. The Supreme Court of New Jersey passed upon all of these questions in its opinion (Appendix B, infra). Federal questions are, therefore, properly presented by virtue of petitioner's claims of Fifth and Fourteenth Amendment violations.

Reasons for Granting the Writ

1. The New Jersey Supreme Court has established, by an administrative directive, a procedure whereby all gambling offenders convicted in each county in the State are sentenced by a single judge within that county, irrespective of whether or not the individual was tried before that judge. The sentencing judge is not specially trained in sentencing but is merely selected on an individual basis by the Assignment Judge of each county. Only gambling offenders are singled out for this unusual treatment. The New Jersey Supreme Court found "no trace of a constitutional question" in this procedure but the court did split 4-3 over whether this directive constituted "a wise exercise of policy" and whether it "is compatible with modern views of penalogy and sound judicial administration." The New Jersey Supreme Court was unable to find any authority to sustain this novel practice just as petitioner can find none specifically in point to condemn it. However, this dearth of authority appears rather clearly to emanate from the unusual and unprecedented nature of the scheme rather than from any want of constitutional infirmity in its operation. Initially it is clear that action of the state judiciary constitutes state action under the Constitution. Shelley v. Kramer, 344 U.S. 1 (1945). Furthermore, this

Court stated in Morey v. Doud, 354 U.S. 457, 464 (1957):

> "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

The most unusual aspect of the procedure here in question is that it is accomplished not by legislative action but by means of a judicial directive. On its face the directive discriminates between those convicted of gambling crimes and all others convicted of every type of penal violation. Surely, the individual thus singled out for special sentencing treatment is denied the equal protection of the laws as guaranteed him by the Fourteenth Amendment. It also deprives petitioner and those similarly situated of the due process of law by virtue of the fundamental unfairness of the procedure. The objective of this directive might be difficult enough to sustain if it were the product of legislative action but it is completely indefensible when it results from the unbridled fiat of an appellate court. The entire procedure is so unfair and is of such an unusual character that it merits close scrutiny by this Court to determine whether or not fundamental constitutional rights are not being trampled under foot by the New Jersey courts.

2. The publicity surrounding the promulgation of this directive, which was never published openly until the opinion below, made it clear that the directive singled out gambling offenses due to their alleged connection with organized crime. In the majority opnion below this view was again reiterated as a backdrop against which this unusual

procedure was to be employed. The court went out of its way to indicate that it views gambling as the "greatest source of revenue for organized crime." It went on, after restating its earlier views that such offenses could only be adequately treated by prison sentences, to add that it hoped "the sentencing judge would see the judiciary's responsibility as we see it." Having expressed these strong views with respect to the necessity of prison terms for gambling offenders and having directed that only one judge in each county do the sentencing, it becomes meaningless to recite, as did the sentencing judge in this case, that he is to retain his traditional, individual discretion. Indeed it was pointed out in petitioner's appendix on appeal that at least two judges in the state had expressly understood the directive to command jail sentences. This procedure thus runs afoul of the Constitution in several respects. First, a policy which removed the power of the court to grant probation would be so fundamentally unfair as to violate due process of law. Cf. Heidrich v. United States, 373 F.2d 540 (5th Cir. 1967) (Godbold, J. dissenting). Secondly, the climate of opinion created by the expression of these views by New Jersey's highest court, when combined with this single-judge sentencing procedure, causes the sentencing judge to proceed upon a materially false, or at least unproven assumption of fact. This is, that every gambling offender is connected with organized crime. The individual, such as petitioner, who appears for sentence is presumed guilty of crimes far transcending his conviction and is not given the opportunity to refute these facts. Such a sentencing procedure violates due process of law, Townsend v. Burke, 334 U.S. 736 (1948); United States ex rel. Jackson v. Myers,

374 F.2d 707 (3rd Cir. 1967), and conflicts with the fundamental principle of our American system of justice that each individual before the bar for sentencing shall be viewed as an individual and punished accordingly. When the highest court of a state sets out its philosophy for the sentencing of gambling offenders, directs one judge in each county to do all the sentencing, and indicates that it hopes the sentencing judge will follow their views, the result can only be a deprivation of the fundamental right of each convicted person to be judged on the merits of his own background and the particular crime of which he stands convicted. Such a deprivation is so fundamentally unfair as to constitute a denial of due process of law. The Court below completely sidestepped this issue when it found

> "no substance to the claim that the individual is denied equality when the court deals specially with the special evils of syndicated crime, or that due process is denied because some hypothetical defendant may not be a part of a syndicated gambling operation ...."

These few words sum up petitioner's argument. There is precisely no proof that petitioner or anyone else in his position is not the "hypothetical" defendant who is not a part of a syndicated gambling operation. The opinion below creates a presumption that a gambling defendant is connected with organized crime and then makes the presumption conclusive by not permitting any rebuttal of this premise as a part of the sentencing procedure. There could be no clearer instance of petitioner and many hundreds of other persons convicted of lottery and bookmaking offenses in New Jersey

being sentenced upon a materially false factual basis. These issues are far more important than "minutiae in a grand scheme of things," in the words of the court below. Surely the Constitution remains as a bulwark against arbitrary and uneven judicial conduct. As the concurring opinion below noted:

> "No defendant, even in gambling cases, is just the same as every other defendant. He is an individual human being with his own background and future and is entitled to be dealt with as such."

Clearly, the Constitution can insure such a result.

3. The remark by the prosecutor in his opening statement invited the jury's attention to "any testimony the defendant might give." The New Jersey Supreme Court said that it saw "no possible harm" in this comment, citing Chapman v. California, U.S. (1967). The petitioner did not testify at his trial and produced no witnesses in his behalf. It is important that this court determine the sweep of the rule laid down in Griffin v. California, 380 U.S. 609 (1965), wherein comment by the prosecution on the accused's silence was forbidden. If prosecutors are now permitted to shift their comments to their opening statements instead of their summations the impact of the Griffin decision will be entirely lost. It should be made clear that such comments are forbidden at any point in a trial and whether made directly or indirectly.

Conclusion

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

s/ Michael A. Querques
MICHAEL A. QUERQUES
Attorney for Petitioner

Dated: